



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Johan Willy DECLERCK Confirmation No: 9009
Appl. No. : 10/583,450
Filed : June 19, 2006
Title : FILM FOR PACKING LIQUIDS OR THE LIKE AND METHOD
FOR MANUFACTURING SUCH A FILM

TC/A.U. : 1794
Examiner : R.E. Zacharia

Docket No.: : DECL3001/REF
Customer No: : 23364

37 CFR §41.37 APPEAL BRIEF

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

This is an Appeal Brief in connection with the above-identified application in which the period for response has been extended to expire on April 3, 2008 by the filing herewith of a Petition for a Two-Month Extension of Time and payment of the required extension fee. The required appeal fee set forth in §41.20(b)(2) in the amount of \$540 is also submitted herewith. Any additional fees necessary for this appeal may be charged to Deposit Account No. 02-0200.

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USSN 10/583,450
Appeal Brief dated: March 13, 2009
Notice of Appeal filed: 3 February 2009

41.37 (c)(1)(I) REAL PARTY IN INTEREST

The real party in interest is the Assignee of record, TEXI-PLEX, EUROPE, naamloze vennootschap

41.37 (c)(1)(ii) RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences with respect to the claimed invention which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal known to appellant, appellant's legal representative or assignee.

41.37 (c)(1)(iii) STATUS OF THE CLAIMS

This application contains claims 1-14. Claims 1-14 are pending and are the claims on appeal. Claims 1-6, 13 and 14 are finally rejected under 35 U.S.C. §102(b). Claims 7-12 are rejected under 35 U.S.C. §103.

41.37 (c)(1)(iv) STATUS OF AMENDMENTS AFTER FINAL REJECTION

No Amendment was filed after final rejection.

41.37 (c)(1)(v) SUMMARY OF CLAIMED SUBJECT MATTER

Film for packaging liquid products, comprising a first polyolefin layer (2), a jointing layer(4) and a layer of polychlorotrifluoroethylene (PCTFE) (3), wherein the PCTFE layer has a thickness of at least 10 micrometers (μm) and the film being extrusion laminated. See page 6, lines 12-18. The polyolefin layer (2) and the jointing layer (4) are co-extrusion laminated with the PCTFE layer (3); see page 6, lines 18 and 19. Film wherein the joining layer is formed of a co-polymer of a polyolefin and glycidyl methacrylate and wherein the jointing layer is formed of a co-polymer of ethylene and glycidyl methacrylate (EGMA); see page 7, lines 15-22.

Film according to claim 3, wherein the PCTFE layer has a thickness of at least 20 μm , the jointing layer is formed of a copolymer of polyolefin and glycidyl methacrylate. See page 10, line2 and page 7, lines 18-19.

Method for manufacturing the film for packaging liquid products comprising extruding a jointing layer(4); compressing between a first roller and a second roller the jointing layer and a foil of PCTFE, together with a polyolefin layer so that the PCTFE foil is thus laminated to the jointing layer. See page 8, lines 11-19. The jointing layer (4), together with a layer of polyolefin (2), is extruded onto said first roller (7) in order to form a two-layered foil (12). See page 12, lines 20-30 and Fig. 2).

USSN 10/583,450
Appeal Brief dated: March 13, 2009
Notice of Appeal filed: 3 February 2009

41.37 (c)(1)(vi) GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

There are three rejections to be reviewed on appeal. Two anticipation rejections and one rejection on the grounds of obviousness.

THE ANTICIPATION REJECTIONS

The first anticipation rejection to be reviewed is of claims 1-6, 13 and 14 under 35 U.S.C. §102(b) as being anticipated by JP 63-224944A. Applicants translation of this patent is relied upon in the rejection.

The second anticipation rejection to be reviewed is of claims 1- 4 under 35 U.S.C. §102(b) as being anticipated by Tsai et al., USP 6,306,503.

THE OBVIOUSNESS REJECTION

There is one obviousness rejection to be reviewed on appeal and this is the rejection of claims 7-12 under 35 U.S.C. §103 as being unpatentable over Tsai in view of Annegret, EP 1,287,909.

USSN 10/583,450
Appeal Brief dated: March 13, 2009
Notice of Appeal filed: 3 February 2009

41.37 (c)(1)(viii) ARGUMENT

THE ANTICIPATION REJECTIONS

The Applicable Law to be applied in each anticipation rejection

Appellants most respectfully direct the Examiner's and Board's attention to MPEP § 2131 which states that to anticipate a claim, the reference must teach every element of the claim.

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). "The identical invention must be shown in as complete detail as is contained in the ... claim." *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed Cir. 1989). The elements must be arranged as required by the claim, but this is not an *ipsissimis verbis* test, i.e., identity of terminology is not required. *In re Bond*, 910 F.2d 831, 15 USPQ2d 1566 (Fed.Cir. 1990).

All of the limitations in the claims must be considered as they would be interpreted by one of ordinary skill in the art to which the invention pertains. See MPEP §2111 Claim Interpretation; Broadest Reasonable Interpretation CLAIMS MUST BE GIVEN THEIR BROADEST REASONABLE INTERPRETATION. During patent examination, the pending claims must be "given their broadest reasonable interpretation consistent with the specification." >The Federal Circuit's *en banc* decision in *Phillips v. AWH Corp.*, 415 F.3d 1303, 75 USPQ2d 1321 (Fed. Cir. 2005) expressly recognized that the USPTO employs the "broadest reasonable interpretation" standard: The Patent and Trademark Office ("PTO") determines the scope of claims in patent applications not solely on the basis of the claim language, but upon giving claims their

USSN 10/583,450

Appeal Brief dated: March 13, 2009

Notice of Appeal filed: 3 February 2009

broadest reasonable construction "in light of the specification as it would be interpreted by one of ordinary skill in the art." *In re Am. Acad. of Sci. Tech. Ctr*, 367 F.3d 1359, 1364[, 70 USPQ2d 1827] (Fed. Cir. 2004).

The broadest reasonable interpretation of the claims must also be consistent with the interpretation that those skilled in the art would reach. *In re Cortright*, 165 F.3d 1353, 1359, 49 USPQ2d 1464, 1468 (Fed. Cir. 1999).

THE FIRST ANTICIPATION REJECTION

The first anticipation rejection to be reviewed is of claims 1-6, 13 and 14 under 35 U.S.C. §102(b) as being anticipated by JP 63-224944A. This action relies upon the English language translation provided by the applicant.

It is urged in the rejection that JP 63-224944 A teach a multilayer film formed by co-extrusion comprising an ethylene-ethyl acrylate-maleic anhydride layer bonded to a polychlorotrifluoroethylene layer by ethylene-glycidyl methacrylate-vinyl acetate polymer (abstract). The ethylene-ethyl acrylate-maleic anhydride layer corresponds to the polyolefin layer of the instant claims. The ethylene-glycidyl methacrylate-vinyl acetate polymer corresponds to the jointing layer of the instant claims. In the embodiment of the example, the polychlorotrifluoroethylene layer has a thickness of 150 μm .

The statement that the ethylene-ethyl acrylate-maleic anhydride layer corresponds to the polyolefin layer of the instant claims is incorrect and is not consistent with the meaning of the term polyolefin as used in the specification and as it would be interpreted by one of ordinary skill in the art to which the invention pertains and is an unreasonable interpretation of the term polyolefin. Therefore, for this reason alone, there is no anticipation of the claims by this reference.

As described in Applicant's specification, by the term polyolefin are hereby understood polymers which are mainly built up of carbon atoms and hydrogen atoms, such as for example polyethylene, polypropylene, 1-butene, 4-methyl pentane, etc. As further noted therein, the first layer 2, in particular the layer which is designed as contact layer for the content of the packaging, consists of a transparent, colorfast and inert synthetic layer, which in this case consists of a polyolefin such as PE, PP and/or PB. As PE, PP and/or PB are preferably used as a first layer 2, which synthetic materials can for example be welded under the influence of heat, the packaging can be sealed quickly and in a simple manner. Consequently, the film 1 can be applied as a packaging in the shape of for example little bags or in place of glass ampoules for any of the above-mentioned components.

That this interpretation is not an improper reading into the claims of limitations from the specification is readily apparent from the dictionary definition of polyolefin as a polymer of an alkene, such as polyethylene. An ethylene-ethyl acrylate-maleic anhydride layer would be understood to be a polyester.

Film for packaging liquid products is also a claim limitation which cannot be ignored and has not been met by the reference. This is not simply a recitation of intended use but breathes life into the claimed subject matter. The file of the present invention is directed to an entirely different use than that of the JP reference.

The JP reference relates to a process for producing a multilayered film that is to be a moisture-resistant film for sealing an electroluminescence device (hereinafter, referred to as an EL device). No one of ordinary skill in the art would interpret this film as useful for packaging liquids such as cosmetics or pharmaceuticals in accordance with the presently claimed invention.

As noted in the JP reference, it has become apparent that the adhesion force among respective layers, i.e., the PCTFE, the adhesion layer and the moisture absorption layer, is extremely important. For obtaining high moisture resistance which has never been achieved by a conventional moisture-resistant film, the present inventors have conducted extensive study regarding a new fluorine resin multilayered

film. As the result, it has been found that the lamination of two kinds of modified ethylene terpolymer (there is no use of the term polyolefin in the reference) as adhesion layers greatly increases the adhesion strength between a fluorine resin layer and one adhesion layer and between another adhesion layer and a moisture absorption layer of an EL device, and various methods have been examined as the lamination method. As the result, it has been found that when three kinds of resins including the fluorine resin are simultaneously extruded according to the co-extrusion method, the fluorine resin and ethylene-glycidyl methacrylate-vinyl acetate terpolymer (hereinafter, abbreviated as an EGV resin) are strongly heat-sealed with each other, which has never been attained by a conventional method. (Emphasis added.)

The invention of the JP reference resides in a process for producing a multilayered film characterized in that upon laminating an ethylene-ethyl acrylate-maleic anhydride terpolymer (hereinafter, abbreviated as an EEM resin) on a fluorine resin via an EGV resin, the foregoing three kinds of resins are simultaneously extruded according to a co-extrusion method. The EGV resin (6) is required to be laminated on the PCTFE layer (5). This is because the EGV resin shows strong adherence to the PCTFE film compared with any other thermoplastic resins.

Further, the reason why the EEM resin (7) is laminated on the EGV resin (6) is because, as the moisture adsorption layer provided on the EL device, a polyamide resin is commonly used and the EEM resin (7) shows strong adherence to the polyamide resin at a lower temperature compared with a conventionally used ionomer resin or adhesion resin. Clearly, this is not an anticipation of claims 1-4 on appeal

Claims 5, 6, 13 and 14 Do Not Stand Or Fall With The Rejection of Claims 1-4

Claims 5, 6, 13 and 14 are more limited claims in which the joining layer is formed of a co-polymer of a polyolefin and glycidyl methacrylate and in particular, the jointing layer is formed of a co-polymer of ethylene and glycidyl methacrylate (EGMA). These are claim limitations which cannot be ignored and certainly, the

ethylene-ethyl acrylate-maleic anhydride layer which is said, in the rejection, to correspond to the polyolefin layer does not anticipate either of these terms as interpreted by one of ordinary skill in the art. Accordingly, this rejection should be withdrawn or reversed on appeal.

THE SECOND ANTICIPATION REJECTION

The second anticipation rejection to be reviewed is of claims 1- 4 under 35 U.S.C. §102(b) as being anticipated by Tsai et al., USP 6,306,503.

The Tsai reference does not anticipate the subject matter of claims 1-4. Tsai teaches a multilayer film comprising a fluoropolymer layer attached to a thermoplastic layer by means of an intermediate adhesive layer (column 2, lines 20-26). Preferably, the fluoropolymer is a homopolymer or copolymer of chlorotrifluoroethylene (column 2, lines 34-37). Preferably, the thermoplastic layer comprises a polyolefin (column 2, lines 52-53). The fluoropolymer layer may have a thickness of up to 10 mils, i.e., ~ 250 μm (column 4, lines 9-10). The multilayer film may be formed in any conventional manner including coextrusion and lamination (column 3, lines 58-64).

In accordance with Tsai, there is provided a multilayer film which comprises at least one fluoropolymer layer and at least one thermoplastic layer comprising a thermoplastic homopolymer or copolymer, attached to a surface of the fluoropolymer layer by an intermediate adhesive layer. The intermediate adhesive layer comprises a blend of (1) an olefin-containing polymer selected from the group consisting of at least one functionalized polyolefin; at least one copolymer of the ethylene and at least one comonomer selected from the group consisting of acrylic acid, alkyl acrylic acid, acrylates and alkyl acrylates; and blends thereof and (2) a styrene-containing rubber. Preferably, the rubber is a hydrogenated styrene-butadiene-styrene block copolymer

also referred to as a styrene-ethylene-butylene-styrene block copolymer.

It is the essence of Tsai to provide a relatively small amount of styrene-containing rubber in the intermediate adhesive layer in order to increase the adhesion of the layers. However, it is clearly stated that a film according to Tsai may be manufactured according to any conventional technique, preferably by co-extrusion, alternatively by lamination (cf. Col. 3, lines 58-64).

Moreover, the presently claimed invention aims at manufacturing a film according to extrusion lamination, which is not a conventional technique for multilayered films, which offers the advantage that any thickness for a PCTFE layer may be used (cf. page 8, 11. 12-24). That is, the jointing layer of a film according to the present invention does not necessarily comprise styrene-containing rubber as required by Tsai.

Moreover, the film for packaging liquid products is also a claim limitation which cannot be ignored and has not been met by the reference. This is not simply a recitation of intended use but breathes life into the claimed subject matter. The file of the present invention is directed to an entirely different use than that of the Tsai reference. See column 6 of Tsai which teaches lamination with PVC for packaging pills, which are not liquids in accordance with the presently claimed invention. The structure of the presently claimed invention is different from that of Tsai. Applicant therefore is of the opinion that of claim 1 of the present application is new with respect to Tsai. Accordingly, it is most respectfully requested that this rejection be withdrawn or reversed on appeal.

THE OBVIOUSNESS REJECTION

Examples Of Basic Requirements of a Prima Facies Case of Obviousness

The appellant submits that the criteria set forth in the MPEP provides guidance in determining the issue of obviousness of the claims on appeal.

---SECTION---2143 Examples Of Basic Requirements of a Prima Facie Case of Obviousness

The Supreme Court in *KSR International Co. v. Teleflex Inc.*, 82 USPQ2d 1385, 1395-97 (2007) identified a number of rationales to support a conclusion of obviousness which are consistent with the proper "functional approach" to the determination of obviousness as laid down in *Graham*. The key to supporting any rejection under 35 U.S.C. 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious. The Supreme Court in *KSR* noted that the analysis supporting a rejection under 35 U.S.C. 103 should be made explicit.

SECTION---2143.03 All Claim Limitations Must Be Taught or Suggested

To establish prima facie obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. In *re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). "All words in a claim must be considered in judging the patentability of that claim against the prior art." In *re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970). If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. In *re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988).

Appellant note the Examiner's comments in the Final Rejection that any differences between the prior art would have been obvious to one of ordinary skill in the art as a routine modification of the product in the absence of a showing of unexpected results does not establish a prima facie case of obviousness. This statement is tantamount to the statement that the invention was well within the ordinary skill in the

art which has been found to be insufficient. A statement that modifications of the prior art to meet the claimed invention would have been "well within the ordinary skill of the art at the time the claimed invention was made" because the references relied upon teach that all aspects of the claimed invention were individually known in the art is not sufficient to establish a *prima facie* case of obviousness without some objective reason to combine the teachings of the references. *Ex parte Levengood*, 28 USPQ2d 1300 (Bd. Pat. App. & Inter. 1993). ***>[R]ejections on obviousness cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *KSR*, 550 U.S. at ___, 82 USPQ2d at 1396 quoting *In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006).<

THE OBVIOUSNESS REJECTION

The obviousness rejection to be reviewed on appeal is the rejection of claims 7-12 under 35 U.S.C. §103 as being unpatentable over Tsai in view of Annegret, EP 1,287,909.

In the final rejection it is stated that Tsai teaches all the limitations of claims 7-12, as outlined above, except for the specific details of the extrusion/lamination process. This statement is specifically traversed in view of the comments above as to why Tsai does not anticipate the subject matter of claims 1-4. Tsai does teach that the multilayer film may be prepared in a convention manner (column 3, lines 58-64). However, the preferred method is by coextrusion as shown in Example 1 wherein the three-layer multilayer film was coextruded and cast onto a casting roll which in no way suggest the presently claimed invention .[

Annegret is directed to a method for forming coatings and laminations (paragraph 0001). Figures 2-10 illustrate various embodiments for adhering first and second substrates with a hot melt adhesive wherein the adhesive is extruded and the

laminate is compressed between first and second rollers (paragraph 0030). The adhesive may be extruded on a first layer to form a two layer on one of the rollers before passing through the nip between the rollers (e.g. Figures 2 and 3). Alternatively, the adhesive may be extruded between the rollers guiding the first and second layers through to the nip (Figure 4). The rollers may be heated (paragraph 0033) and at least one roller typically comprises rubber (paragraph 0031). The method of Annegret avoids streaking and striation problems and allows the lamination to be carried out inline or offline (paragraphs 0006-0007).

One skilled in the art would be motivated to use the method of Annegret to form the multilayer film of Tsai to yield a product that does not suffer from streaking and striation problems and to take advantage of the ability to operate inline and/or offline as needed, particularly since Tsai explicitly teaches the multilayer film may be prepared in any conventional manner. However, there is no suggestion in Tsai that there is a streaking problem and therefore the motivation suggested in the rejection is not based on the reference but is actually hindsight based on Applicant's disclosure, which even under KSR, is impermissible. Moreover, one of ordinary skill in the art would appreciate that the coating technique of Annegret relates to the formation of very thin coatings as noted in [0044] of the patent which teaches away from the extrusion lamination of the presently claimed invention.

With respect to claim 8, it would be within the ability of one skilled in the art to extrude the adhesive onto either of the layers, including the polyolefin layer, since the adhesive adheres to both layers (otherwise it would not keep the laminate together) and both layers are compressed together through the same nip. This is an unsubstantiated allegation and does not take into consideration the various viscosities and melting points of the films nor of the non-contact slot coating technique of the secondary reference which does not overcome the deficiencies of the primary reference. Thus, one skilled in the art would not be expected to have an equal expectation of success regardless onto which layer the adhesive was extruded.

As noted in Applicant's specification, up to now, no method was known for

manufacturing a PCTFE film with a relatively large thickness, as described in claim 1, which is a claim limitation which cannot be ignored. To this end, the invention concerns a method which can be applied for manufacturing a film according to claim 1, whereby the jointing layer is extruded, characterized in that the jointing layer and the above-mentioned foil of PCTFE, together with a polyolefin layer, are compressed between a first roller and second roller, whereby the PCTFE foil is thus laminated to the jointing layer. An advantage of this method according to the invention is that, by bonding the jointing layer with the PCTFE foil by means of lamination, any thickness whatsoever of PCTFE foil can be used. Another advantage which is linked to the application of an extrusion lamination is that, when manufacturing the film, the difference in viscosity between the jointing layer, PCTFE and possibly the applied polyolefin does not have to be taken into account, as these substances can be extruded at different moments, so that a larger range of polyolefins can be applied, as well as a larger range of substances which can be applied as jointing layer. Accordingly, this aspect of the rejection should be withdrawn or reversed on appeal.

With respect to claims 10-12, since either roller may be designated an "the first roller" or "the second roller," the fact that at least one roller is heated and at least one roller typically comprises rubber is sufficient to satisfy the limitations of these claims. Applicant most respectfully submits that a person skilled in the art who wishes to obtain a better adhesion between layers of a multilayer packaging film, as is the objective of the present application and of Tsai, would not directly be stimulated to apply extrusion lamination. Instead, Applicant submit that said person would be stimulated to look for different compositions of the adhesive layer in order to obtain better adhesive qualities. One skilled in the art may think of altering the manufacturing parameters but Annegret does not directly disclose a general method of applying coextrusion lamination for a film according to characteristic I of claim 1 of the present application but instead is direct to very thin coatings.

Furthermore, nowhere in Annegret it is disclosed that altering the manufacturing parameters would lead to better adhesion between the layers. Annegret only aims at

USSN 10/583,450

Appeal Brief dated: March 13, 2009

Notice of Appeal filed: 3 February 2009

avoiding streaking and striation problems for coatings on films (cf. § 6) , either by an inline or offline configuration (cf. § 7), obtaining film-to-film laminations which do not require the use of reactive adhesives (cf. § 8) and providing improved coating methods (cf. § 9).

Finally, should one of ordinary skill in the art eventually think of altering the manufacturing parameters, it is' clear from both Annegret and the present application that altering said parameters would be a process of much trial and error with an almost infinite number of variables and not a finite number as sanctioned by KSR.

It is the essence of the present invention that the material properties of the jointing layer are carefully selected in function of:

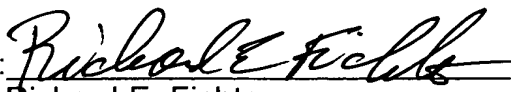
- the purpose for which the film is designed (cf. page 11, 11. 16-20),
- the desired thickness of the film and/or the individual layers (cf. page 10, 11. 9-13),
- the material of the polyolefin layer with which the adhesive layer (4) is jointed to form a two—layered foil (12) (cf. page 12, 11. 21-29) whereby the temperatures of the rollers subsequently play a major role in the bonding of said foil to the PCTFE foil (11) in the lamination process (cf. page 13, 11. 4-10). Accordingly, it is most respectfully requested that this rejection be withdrawn or reversed on appeal.

IX. CONCLUSION

In view of the above arguments, all of the rejections of the claims on appeal should be reversed. The application should be passed to issue.

Respectfully submitted,

March 13, 2009

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41.37 (c)(1)(viii) Claims appendix

1. Film for packaging liquid products, comprising a first polyolefin layer, a jointing layer and a layer of polychlorotrifluoroethylene (PCTFE), wherein the PCTFE layer has a thickness of at least 10 micrometer (μm) and the film being extrusion laminated.

2. Film according to claim 1, wherein the polyolefin layer and the jointing layer are co-extrusion laminated with the PCTFE layer.

3. Film according to claim 1, wherein the PCTFE layer is made of a homopolymer PCTFE.

4. Film according to claim 1, wherein the PCTFE layer has a thickness of at least 20 μm .

5. Film according to claim 1, wherein the joining layer is formed of a co-polymer of a polyolefin and glycidyl methacrylate.

6. Film according to claim 5, wherein the jointing layer is formed of a co-polymer of ethylene and glycidyl methacrylate (EGMA).

7. Method for manufacturing a film according to claim 1, comprising extruding a jointing layer; compressing between a first roller and a second roller the jointing layer and a foil of PCTFE, together with a polyolefin layer so that the PCTFE foil is thus laminated to the jointing layer.

8. Method according to claim 7, wherein the jointing layer, together with a layer of polyolefin, is extruded onto said first roller in order to form a two-layered foil.

USSN 10/583,450

Appeal Brief dated: March 13, 2009

Notice of Appeal filed: 3 February 2009

9. Method according to claim 7, including extruding the jointing layer between the rollers, and guiding a polyolefin foil over the first roller and guiding a PCTFE foil over the second roller.

10. Method according to claim 7, including providing at least the first roller with a heat regulation.

11. Method according to claim 7, wherein the second roller has a rubber coating.

12. Method according to claim 7, including providing the second roller with a heat regulator.

13. Film according to claim 3, wherein the PCTFE layer has a thickness of at least 20 μm , the jointing layer is formed of a copolymer of polyolefin and glycidyl methacrylate.

14. Film according to claim 13, wherein the jointing layer is formed of a copolymer of ethylene and glycidyl methacrylate (EGMA).

USSN 10/583,450

Appeal Brief dated: March 13, 2009

Notice of Appeal filed: 3 February 2009

41.37 (c)(1)(ix) Evidence appendix

None

USSN 10/583,450

Appeal Brief dated: March 13, 2009

Notice of Appeal filed: 3 February 2009

41.37 (c)(1)(x) Related proceedings appendix

None